

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

75-6105

United States Court of Appeals
FOR THE SECOND CIRCUIT

BATTERY STEAMSHIP CORP.,
Plaintiff-Appellant,
against

UNITED STATES OF AMERICA,
Defendant-Appellee.

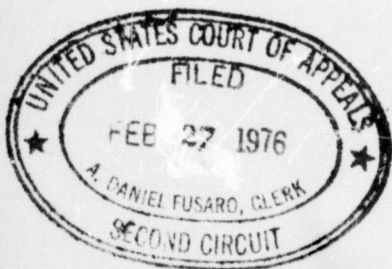
ON APPEAL BY BATTERY STEAMSHIP CORP. FROM A DECISION
OF THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX BY ATTORNEYS FOR THE
RESPECTIVE PARTIES

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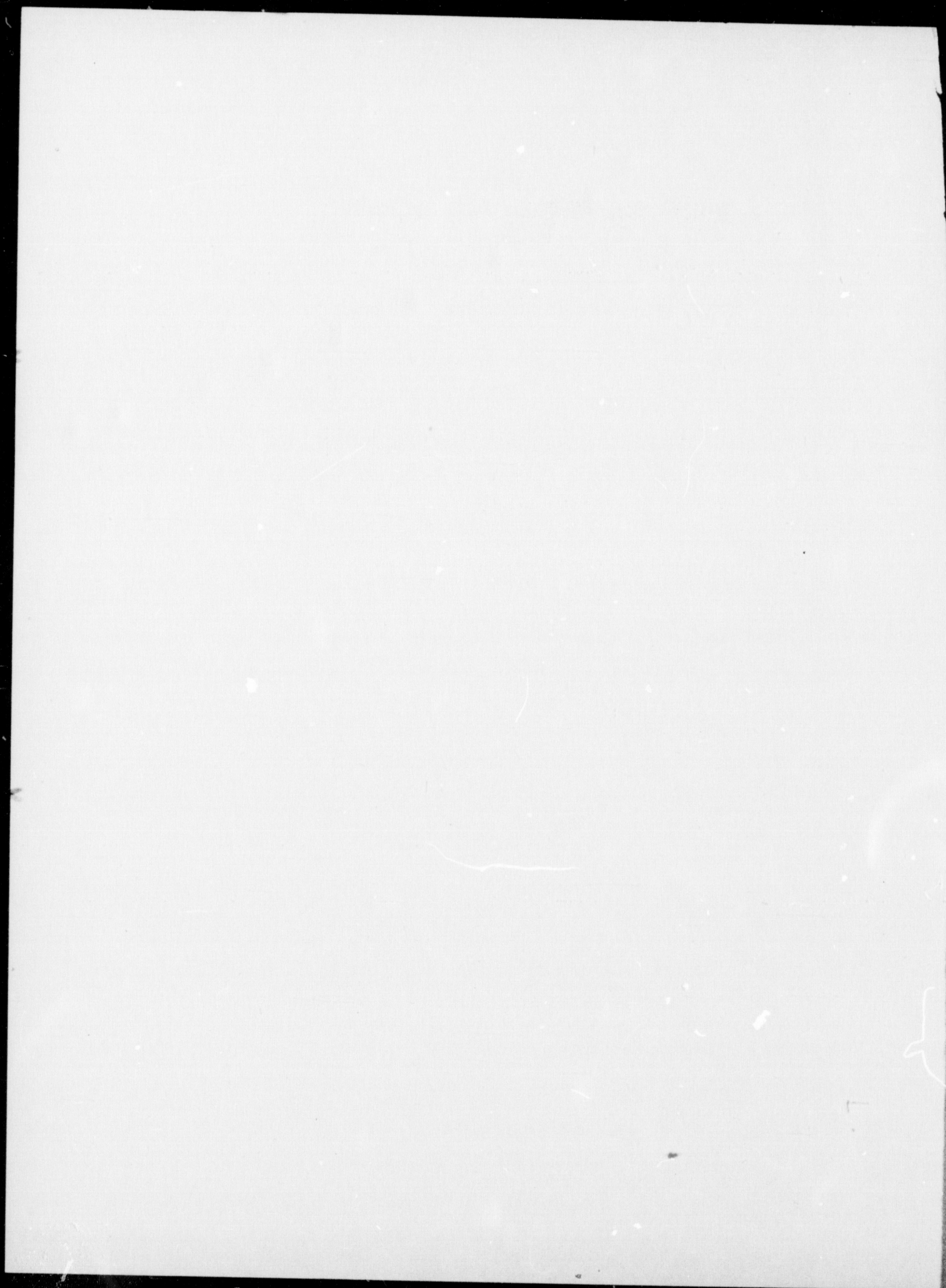
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United States Court of Appeals
FOR THE SECOND CIRCUIT

BATTERY STEAMSHIP CORP.,

Plaintiff-Appellant,

against

UNITED STATES OF AMERICA,

Defendant-Appellee.

69 Civil 2736

Battery Steamship Corp. vs. The U.S.A.

69 Civil 2736

Relevant Docket Entries.

DATE	PROCEEDINGS
Jun 24, 69	Filed complaint and issued summons.
Jul 7/69	Filed stip and order that defts is not required to answer to the until 30 days after written notice for pltf requiring such Ryan J.
May 12-72	Filed pltffs notice of deposition.
Jan. 10-73	Filed Interrogatories propounded by pltf. to deft. U.S.A.
Apr. 5, 73	
Jun. 19-73	Filed deft's U.S.A. affdvt. and notice of motion Re: Dismissing the action, etc. Ret. 6-29-73.
Jul. 11, 73	Filed Pltffs Notice of Cross-Motion for Summary Judgment Against Deft U.S.A. before Judge Metzner at time & place set by Court re: strike affirmative of defense of release, etc.

Relevant Docket Entries.

DATE	PROCEEDINGS
Sep. 26-73	Filed deposition of Norton Crockett.
Sep. 26-73	Filed Opinion #39857-deft. US. motion for summary judgment is granted. Pltff's cross-motion for summary judgment striking the affirmative defense is denied. So ordered.—Metzner, J. (m/n).
Sep. 27-73	Filed JUDGMENT—ORDERED AND DECREED that deft. USA have summary judgment against pltf. dismissing complaint. Clerk. mn/entered on docket 9-28-73.
Oct. 24-73	Filed plaintiff's notice of appeal to the USCA for the 2nd Circuit from judgment filed Sep-27-73—mailed copy to US Atty. Gilbert S. Fleischer, 26 Fed. Plaza, NYC 10007 on 10-29-73.
May 8-73	Filed plaintiff's opposing affidavit to motion to dismiss the amended complaint; memo. of law in support.
Nov. 15-73	Filed reply affidavit in support of motion to dismiss on behalf of Deft. Refineria Panama, S.A. (filed in ct on May 10-72)
11-21-73	Filed notice that the record on appeal has been certified and transmitted to the USCA
05-01-75	PRE-TRIAL CONFERENCE HELD BY Metzner, J.
05-23-75	Filed pltf's notice to take deposition of Edward Lilly, a witness.
06-09-75	Filed true copy of USCA order with opinion attached that the judgment of the D.C. is reversed and that the action be remanded to D.C. for further proceedings in accordance with the opinion of C.A. and with costs taxed against the appellee. Docketed as judgment #75,517 (on 6-11-75) m.n.
06-09-75	Case reopened.
06-20-75	NON-JURY trial begun before Metzner, J. and concluded. Decision reserved.

Relevant Docket Entries.

DATE	PROCEEDINGS
06-26-75	Filed deft. USA's reply to pltf's trial memorandum.
08-25-75	Filed OPINION #42995 . . . At the trial, evidence of mutual mistake was presented, etc. Battery's remedy was to seek recovery from Refineria, but it failed to do so in a timely manner. The complaint is dismissed. So ordered.—Metzner, J.
09-09-75	Filed AMENDMENT to OPINION (#42995 correcting page 6, line 8 as indicated.—Metzner, J. (attached to Original opinion)
09-17-75	Filed Judgment and order that the complaint is dismissed against the USA and further ordered that the word "Bartery" at line 6 of the opinion #42,995 be changed to read "MSTS"—this judgment consented to.—Metzner, J. Judgment entered—CLERK.
10-09-75	Filed pltf's notice of appeal to the USCA for the 2nd Circuit from judgment entered on 9-17-75
12- 2-75	Filed post trial memorandum of law on behalf of pltff.
12- 2-75	Filed pre-trial brief of deft. U.S.A.
12- 2-75	Filed trial memorandum of law on behalf of pltff.
12- 2-75	Filed Deposition of A. Dan Klyver.
12- 2-75	Filed Deposition of Hammond L. Cederholm.
12- 2-75	Filed Agreed statement of facts on consent.
12- 2-75	Filed deposition of Edward N. Lilly.

A TRUE COPY

RAYMOND F. BURGHARDT, Clerk

By (Illegible)

Deputy Clerk

Agreed Statement of Facts with Exhibits.

The following facts are not disputed by either party.

1. The SS ELWELL owned by plaintiff Battery Steamship Corp., a New York corporation, with offices in New York, was anchored in Colon Bay, Republic of Panama, on 25 June 1967.

2. While the SS ELWELL was at proper anchor in Colon Bay, Republic of Panama, on June 25, 1967, she was receiving fuel oil from the tank barge OILBAR No. 4, owned by Refineria Panama, S.A., which was tied up to the port side of the SS ELWELL.

3. During the fueling operation, OILBAR No. 4 repeatedly struck and damaged the port side of the SS ELWELL.

4. Defendant, United States of America, through its Department of Navy, Military Sea Transportation Service, arranged for and ordered the fuel and paid Refineria Panama, S.A. for it.

5. Refineria Panama S.A. is a private corporate entity engaged in supplying fuel oils to vessels and is not owned or operated by defendant, United States of America.

6. At the time the SS ELWELL was being fueled, the vessel was on time charter to Department of Navy, Military Sea Transportation Service, pursuant to Contract No. N0003367TC421, a true copy of which is annexed as Exhibit A.

7. The Contract N0003367TC421 was amended to include Amendments 1, 2 and 3 dated 22 November 1967, 4 June 1968 and 7 August 1968, respectively, copies of which are contained in Exhibit A.

Agreed Statement of Facts with Exhibits.

8. That Amendment No. 3 contains reference to a letter prepared by or on behalf of Battery Steamship Corp. dated August 5, 1968, a true copy of which is annexed as Exhibit B.

9. That the letter of August 5, 1978 contains no mention of the claim for striking damage allegedly sustained by the SS ELWELL on June 25, 1967.

10. George L. Kurpiel, a contract administrator at Military Sealift Command in March 1967, if called at trial, would testify as follows:

That Article 8 of the MSTS Dry Cargo Time Charter (the charter applicable in this case) provides for payment by the Government to the shipowner for any damage sustained to the vessel while the vessel is loading or discharging cargo or preparing to do so.

He would further testify that the reason for this blanket liability on the Government's part is that the Government either unloads the ship's cargo itself with its own employees or Government employees supervise and direct private stevedores to unload the cargo.

He would further testify that Article 16, the fueling provision, provides for payment to the vessel owner for certain additional expenses incurred by the owner in taking fuel. As Contract Administrator, it would be his opinion that these expenses would not include damage caused by the negligence of Refineria in supplying the fuel.

He would further testify that the letters identified at the deposition of Mr. Cedarholm were received by Military Sealift Command as well as the damage statements relating to the repairs. These were rejected by Military Sealift Command and returned to Battery Steamship as not a Government responsibility under the charter.

Mr. Kurpiel would also testify that Article 8 and Article 16 of the Charter Party were non-negotiable.

Agreed Statement of Facts with Exhibits.

The parties further agree that the stipulation of the above facts in no way constitutes a waiver of any legal rights of either party to this suit, and plaintiff does not agree with the interpretation of the Charter Party by Mr. Kurpiel. In fact, Messrs. Ceharholm and Klyver, plaintiff's witnesses, expressly deny that the Government is not responsible for damage sustained to the vessel during the fueling operation by the third party who had been ordered by the Government to refuel the SS ELWELL.

Dated: New York, New York, June 16, 1975.

DOUGHERTY, RYAN, MAHONEY,
PELLEGRINO & GIUFFRA
Attorneys for Plaintiff

By: s/ ROBERT J. GIUFFRA

PAUL J. CURRAN
United States Attorney
GILBERT S. FLEISCHER
Attorney in Charge
Admiralty & Shipping Section
Department of Justice
Attorneys for Defendant

By: s/ TERENCE GARGAN

Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.

Plaintiff Ex. 1 For Ident.
29 Day of Nov, 1972
WILLIAM KAPLAN

United States of America



DEPARTMENT OF THE NAVY

Washington, D.C., 2 March 1972

I hereby certify that the annexed Time Charter Party Contract
N0003367TC421 with Amendments 1 through 3 for the SS ELWELL entered
into on 27 March 1967 is a true and correct copy of the original document
which is on file and kept as part of the official records of the Military
Sealift Command, Department of the Navy, under my official custody as
Deputy Contracting Officer.

James V. Mullen
JAMES V. MULLEN
Commander, SC, USN
(Official title)
Military Sealift Command

OFFICE OF THE SECRETARY

I hereby certify that JAMES V. MULLEN
who signed the foregoing certificate, was at the time of signing
Deputy Contracting Officer, Commander, SC, USN, Military Sealift Command
and that full faith and credit should be given his certification
as such.

In testimony whereof, I have hereunto
set my hand and caused the Seal of the
Navy Department to be affixed this
sixth day of March, one
thousand nine hundred and seventy-two.



Richard J. Selman
Richard J. Selman

Richard J. Selman
Captain, JAGC, U. S. Navy
Assistant Judge Advocate General
(Military Law)
For the Secretary of the Navy

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EX-A

EXHIBIT
A

*Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.*

MSTS FORM 4330-2 (REV. 10-61)

DEPARTMENT OF THE NAVY
MILITARY SEA TRANSPORTATION SERVICE
WASHINGTON 25, D. C.

CONTRACT NO.
N0003367TC421

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TIME CHARTER PARTY

MSTS DRY CARGO WAR RISK FORM

CONTRACTOR AND ADDRESS: Battery Steamship Corporation
80 Broad Street
New York, New York 10004

CONTRACT FOR: TIME CHARTER OF VESSEL FOR SPECIFIED TIME

This contract is entered into as a result of negotiation pursuant to the authority of Title 10 U. S. Code 2304(a) (10); and any necessary determinations and findings, or other supporting statement of justification, prescribed by that Act or by the Armed Services Procurement Regulation have been made.

The supplies and services to be obtained by this instrument are chargeable to the following allotments, the available balances of which are sufficient to cover the cost of the same:

AGENCY: MILITARY SEA TRANSPORTATION SERVICE
APPROPRIATION: NAVY INDUSTRIAL FUND, 17X4912.3302
EXPENDITURE ACCOUNT: 45000
ACTIVITY: 62387

THIS CHARTER PARTY, entered into this 27th day of March, 1967, at Washington, D. C., by and between THE UNITED STATES OF AMERICA (hereinafter sometimes called the "Charterer" and sometimes called the "Government") represented by the Contracting Officer executing this document, and Battery Steamship Corporation a corporation organized and existing under the laws of the State of New York (hereinafter sometimes called the "Owner" and sometimes called the "Contractor").

WITNESSETH THAT

The Owner agrees to let and the Charterer agrees to hire the United States flag SS/AF ELWELL on the following terms and conditions: (C2)

ARTICLE 1. Description of Vessel:

- (a) Classed: A1-ABS
- (b) Engines: Of _____ Normal, _____ Brake, 6600 _____ Shaft, or Indicated H. P., as certified by classification society.
- (c) Speed: Capable of maintaining under normal conditions an average sea speed of about 15 knots in moderate weather when fully laden, on an average consumption of abt. 2600 lbs. (2,240 lb.) standard diesel or similar grade standard grade "C" or equivalent oil fuel per 24 hours. 280
- (d) Net Registered tonnage: 4889
- (e) Deadweight: Deadweight capacity of the Vessel is about 11,201 tons of 2,240 lb., including cargo, bunkers, water and stores on assigned summer mean draft of 28 feet 6-7/8 inches in salt water corresponding to a load line summer freeboard of 11 feet 6-7/8 inches, under present International Load Line Regulations. The Vessel's load line is marked and so placed as to admit of her being safely loaded to such draft.
- (f) Bale cubic capacity for cargo (cubic feet under deck according to ship's plan but not guaranteed by Owner) 528,103, including deep tanks number available for dry cargo.
- (g) Amount and location of permanent ballast carried: None
- (h) Bunker capacity in tons of 2,240 lb. 1744
- (i) Number of hatches and size of hatch openings: No. 1 - 27'x20' No. 4 - 30'x20'
No. 2 - 32'5"x20' No. 5 - 30'x20'
No. 3 - 35'x20'
- (j) Number of winches and derricks with capacity of each:
One 30 ton and sixteen 5 ton boms with companion winches.

**Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.**

~~Access: two (2) tween decks in Hatch No. 1 thru 4~~
One (1) 'tween deck in hatch No. 5

ARTICLE 2. Place and Date of Delivery and Redelivery, etc.

- (a) Place of Delivery: U. S. Gulf port, Charterer's option
 (b) Date of Delivery: 22 May 1967
 (c) Cancellation Date: 14 June 1967
 (d) Redelivery: U. S. Gulf port, Charterer's option
 (e) Charter Hire \$ 3050 per diem. R.O.S. \$1700 per diem.
 (f) Fuel on board at time of Delivery, ~~Minimum 200 tons, Maximum 500 tons~~ as required by COMSTSGULF.

ARTICLE 3. Substitution:

With the approval of the Contracting Officer, Owner may substitute another vessel in the stead of the Vessel hereinbefore named if the Vessel he desires to substitute is similarly fitted, has characteristics substantially the same as those described in Article 1, paragraphs (a) to (k), inclusive; and is otherwise equal in performance to the Vessel hereinbefore named.

ARTICLE 4. Delivery of the Vessel:

(a) The Vessel shall be delivered to the Charterer at the place stated in paragraph (a) of Article 2 on or after the date stated in paragraph (b) of Article 2. The Vessel shall tender with all heavy lift equipment rigged and in operating condition. The heavy lift equipment shall be cradled unless otherwise required by the Charterer. The Owner shall absorb all expenses relating to the initial rigging and final securing of the gear at each port. All other intermediary rigging and unrigging costs, if occasioned by the Charterer, shall be for the account of the Charterer.

(b) The Vessel shall be placed at the disposal of the Charterer at the aforesaid port of delivery in such dock or at such wharf or place (where she may safely proceed to, lie at and depart from, always afloat, at all times of tide, except at such places where it is customary for similar size vessels to lie safely aground) as the Charterer may direct. Vessel on delivery shall be, insofar as due diligence can make her so, seaworthy, tight, staunch, strong, and in every way suitable and adequately fitted for and in all respects ready to receive and transport lawful cargo. Provided, that the Owner is not required to have the Vessel fitted with extra fittings required for a special trade or unusual cargo, unless the Owner herein specifically assumes such obligation.

(c) When the Vessel has arrived at the port of delivery in accordance with paragraph (a) of this Article and is in the berth designated by Charterer, and in the condition described in paragraph (b) of this Article, the Owner shall tender a notice of readiness by letter or telegram to the Contracting Officer or his representative at the port of delivery on a working day (Saturdays, Sundays, and holidays shall not be considered as working days). If proper notice of readiness is received by the Contracting Officer or his representative between 0800 and 1200, acceptance will be made within 4 hours after receipt of such notice. If proper notice of readiness is received between 1201 and 1700, the Charterer shall not be required to accept the Vessel until 0800 of the next working day. If, however, the Contracting Officer elects to receive the notice on Saturday, Sunday or a holiday, or after 1700 on a working day, the Vessel shall be accepted before noon of the next working day, unless the Contracting Officer or his representative at the port shall elect to accept earlier delivery. If the Vessel has arrived at the port of delivery in accordance with paragraph (a) of this Article, and is in the condition described in paragraph (b) of this Article, and is not in the designated berth because such berth is not available, notice of readiness may be tendered in accordance with this paragraph in the same manner as if the Vessel were in the designated berth, and acceptance shall be made in accordance with the provisions of this paragraph.

(d) If the Vessel should arrive at the place of delivery stated in paragraph (a) of Article 2, prior to the date stated in paragraph (b) of Article 2, and is in the condition described in paragraph (b) of this Article, the Contracting Officer or his representative, may, at his election, receive the notice of readiness and may thereafter accept delivery of the Vessel at any time prior to the date stated in paragraph (b) of Article 2. However, if the notice of readiness is received prior to the date stated in paragraph (b) of Article 2, as hereinbefore described in this paragraph, and the Contracting Officer, or his representative does not elect to accept delivery of the Vessel prior to the date stated in paragraph (b) of Article 2, the Vessel will be accepted before noon of the date stated in paragraph (b) of Article 2, without further tender of notice of readiness provided the Vessel is at such time in the condition described in paragraph (b) of this Article.

(e) Should the written notice of readiness not be tendered in accordance with the provisions of this Article prior to 1600 of the date stated in paragraph (c) of Article 2, Charterer shall have the privilege of canceling this Charter at any time not later than the day of the Vessel's readiness.

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*Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.*

ARTICLE 5. Period of the Charter.

minimum twelve (12) to about fifteen (15) months, or termination of the voyage then current, Charterer's

(a) This Charter shall be for a period of ~~about~~ option ~~from the time of delivery of the Vessel. The Charterer shall have the option of continuing this Charter for a second period of about~~ days upon giving the Owner or its agent written notice of the Charterer's election to continue this Charter within days after the date upon which the Vessel was originally delivered.

(b) The Charterer shall have the option of terminating this Charter upon giving not less than days ~~notice of termination to the Owner and redelivery shall be made in accordance with the provisions of Article 26.~~

(c) In the event of detention of the Vessel within continental United States, excluding Alaska, by authorities as a consequence of legal action against the Vessel or Owner whereby the Vessel is rendered unavailable for Charterer's service for a period of 10 days, unless such legal action is brought about by the act or neglect of the Charterer, his agents or servants; the Charterer by reasonably prompt written notice, shall have the election of cancelling this Charter or of suspending same until the service can again be resumed, without prejudice to any right of claim for damage which the Charterer may have in the premises.

ARTICLE 6. Trading Limits.

Trading limits shall be worldwide, but Charterer agrees to notify the Owner as soon as practicable, if the Vessel is sent beyond the limits of American Institute Trade Warranties and to reimburse the Owner for the actual extra cost of marine insurance occasioned by the Vessel's trading beyond such limits.

ARTICLE 7. Description of Cargo.

The Vessel shall be used in transporting any lawful cargo excluding the carriage of livestock, but Charterer shall have the privilege of shipping a small number of livestock on deck at Charterer's risk. All necessary fittings and other requirements for the carriage of livestock on deck shall be for Charterer's account.

ARTICLE 8. Loading and Discharging.

(a) The cargo or cargoes shall be laden and discharged in any dock or at any wharf, place or open roadstead that Charterer may direct, provided the Vessel can lie always safely afloat at any time of tide except at such places where it is customary for similar size vessels to lie safely aground.

(b) The Charterer shall pay all expenses directly connected with the loading and discharging of the cargo including stevedoring, wharfage, clerking, and tallying, winchmen, heavy lifts, dumping, stowing, securing and trimming, and removal of strong backs with shore equipment where the use of shore equipment is not necessitated by a structural or mechanical defect in the Vessel. Unless otherwise provided herein the Charterer shall provide necessary dunnage and shifting boards, also any extra fittings or materials requisite for a special trade or unusual cargoes, but the Owner shall allow the Charterer the use of any dunnage, shifting boards and other fittings or materials already on board the Vessel. The Charterer shall have the privilege of using shifting boards for dunnage, but if the Vessel's shifting boards are used as dunnage, the Charterer shall make good any damage to or shortage of such shifting boards on redelivery of the Vessel. If the Charterer elects or is requested by the Owner to remove dunnage and fittings placed on board by the Charterer, the cost of removal and discharge shall be borne by the Charterer.

(c) The Charterer shall have the use of the Vessel's winches and other appropriate gear actually on board, and the Owner shall provide sufficient power to operate all the Vessel's winches simultaneously. The Vessel shall work night and day, if required by the Charterer.

(d) Any damage to the Vessel or its equipment caused by the act, neglect, or failure of the equipment of the Charterer, its agents, employees or contractors in performing the Charterer's duties of loading and discharging the Vessel, or in preparation for such loading or discharging, shall be repaired at the Charterer's expense and the Owner agrees to assign to the Charterer any rights, causes of action, or other claims which the Owner may have against third persons, except Owner's underwriters, with respect to such damages. Provided, however, that the Charterer shall not be liable for the repair of any damage under this Article 8(d) unless written notice specifying such damage, and, if obtainable, the name of the party or parties causing such damage, shall have been given to the Charterer or its authorized representative within a reasonable time.

(e) Lighterage, if any, will be at the risk and expense of the Charterer.

(f) Cargo shall be loaded, stowed, trimmed, secured and discharged by the Charterer under the Master's supervision.

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*Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.*

(g) In no case shall the cargo exceed ~~that~~ the Vessel can reasonably stow and carry in the ~~stowage~~ of the ~~stowage~~ over and above the space and burden necessary for Vessel's officers and crew, her cabin, ~~stowage~~, apparel, furniture, provision, fresh water, stores, necessary ballast and fuel. The amount of the deck cargo shall be at the discretion of the Master and the loading, stowage and discharge thereof shall be at the risk of the Charterer. Any material required for securing deck cargo is to be furnished by the Charterer and for its account, but Charterer may have the use of any deck lashings aboard the Vessel.

(h) If by reason of the Owner's failure to use due diligence as provided in Article 18(a) to keep the Vessel in a thoroughly efficient state of hull, machinery, equipment, personnel, and other particulars relating to the seaworthiness of the Vessel, the Charterer incurs cost of stevedoring detention or standby time in connection with the loading or discharging of cargo, such costs shall be for the account of the Owner; provided, however, the Owner shall not be liable for such costs unless the period of detention or standby exceeds twenty minutes. The Charterer shall, within a reasonable time, give the Owner or its representative written notice of the detention or standby time.

ARTICLE 9. Cleaning.

(a) Upon delivery in accordance with Article 4, all holds and those deep tanks specified in Article 1(f) shall be cleaned and ready to receive lawful cargo.

(b) Any cleaning of the Vessel's holds or deep tanks during the period of the Charter shall be for the account of the party ordering the last previous use of such holds or deep tanks during the period of this Charter, provided, however, that where the ballast is carried in cargo deep tanks after use by the Charterer for fuel, such ballasting shall not be deemed the last use of such deep tanks for the purposes of this sub-section.

(c) Upon redelivery of the Vessel in accordance with Article 26, the holds of the Vessel and those deep tanks the last use of which was made by the Charterer, shall be swept clean with refuse removed, unless during the period of this Charter the Vessel has carried in these spaces cargo with respect to which custom required more complete cleaning, in which case the Charterer shall give such spaces the required cleaning.

ARTICLE 10. Overtime, Penalty Time and Other Additional Emoluments.

(a) All overtime, penalty time and other additional emoluments payable to the Vessel's crew shall be for the Owner's account except as provided in the subsequent paragraphs of this Article.

(b) When it is necessary at the Charterer's direction to employ officers or members of the Vessel's crew to act as winchmen or tallymen or to perform other services normally performed by longshoremen in connection with working of cargo, the officers or members of the crew so employed shall be deemed the servants of the Charterer while actually engaged in performing such duties, and any wages and overtime or penalty time incurred by such officers or members of the crew while so employed shall be for the Charterer's account. It is understood that when longshore work as described above is performed by officers delegated to supervise such work and who would not otherwise be entitled to overtime or penalty time such officers shall be deemed the servants of the Charterer while acting in such supervisory capacity, (Charterer to pay wages, overtime and penalty time), irrespective of whether or not they are actually physically engaged in services normally performed by longshoremen in connection with working of cargo.

(c) When it is necessary to employ officers or members of the Vessel's crew, during overtime hours, for the purpose of shifting the Vessel in accordance with orders of the Government, overtime and/or penalty time wages paid in accordance with the terms of the Owner's labor agreements to officers or members of the crew actually and necessarily employed in shifting the vessel, including members of the steward's department employed to serve meals as a result thereof (who would not otherwise have been entitled to overtime during the period of the shift, had such shift not been made) shall be for the Charterer's account. The term 'shifting' shall be interpreted as defined in the Owner's labor agreements.

(d) When the Vessel is working cargo during overtime hours, overtime or penalty time wages paid to officers and crew members actually and necessarily employed (who would not otherwise have been entitled to overtime or penalty time wages during such period) shall be for the Charterer's account.

(e) When it is necessary to call back officers and crew members in accordance with orders of the Charterer for the purpose of (1) supervising cargo operations, or (2) shifting or sailing the vessel, any overtime or penalty time wages paid in accordance with terms of Owner's labor agreements to such officers or crew members by reason of the postponement or cancellation of cargo operations, or shifting or sailing of the Vessel, unless the fault of the Owner, shall be for the account of the Charterer.

(f) When at the request of the Charterer in writing, or confirmed in writing, officers or crew members are required during their off hours to remain on board the Vessel in port or in order to be available for duty, any overtime or

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*Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.*

expenses necessarily incurred by the Vessel entering or leaving the aforesaid ports (including custom broker's fees). The Charterer shall also pay for (a) pilotage of the Vessel where such pilotage is customary, or where the Vessel is required by the Government to enter or transit a hazardous or restricted area or body of water; and (b) pilotage or towage in connection with the bunkering or ballasting of the Vessel, or in shifting the vessel in accordance with the orders of the Government. Nothing herein shall be construed as requiring the Charterer to pay expenses incurred by the Owner of the Vessel for services rendered for the convenience of the Owner, the Vessel or its Captain, Officers or Crew such as fees of agents for husbanding the Vessel (except as provided in Article 18(c) or in connection with the Owner's business such as fees of underwriters, surveyors in connection with the loading of the Vessel, or expenses in moving the Vessel about the port to obtain stores or provisions or in connection with the maintenance of the Vessel. All of the charges and expenses which are incurred for Charterer's account as aforesaid shall be paid by the Owner, who shall be reimbursed by the Charterer upon presentation of properly certified vouchers.

ARTICLE 15. Fumigation.

If fumigation is ordered because of cargoes or passengers carried for Charterer's account, or because of ports, wharves or docks visited pursuant to Charterer's instructions the time so lost as a result of the fumigation and the cost incurred thereby shall be for Charterer's account. If the fumigation is ordered for any other reason the time lost thereby and the expenses incident thereto shall be for Owner's account.

ARTICLE 16. Fuel.

(a) Upon delivery of the Vessel the Owner shall present to the Contracting Officer a statement certified by the Owner or his authorized agent showing the amount and grade of fuel on board at the time of delivery with such additional verification as the Contracting Officer may require and the Charterer shall pay the Owner for such fuel at the current market price at the port of delivery upon certification to and verification of such statement by the Contracting Officer, provided, however, that the Owner shall provide additional bunkers as may be required by the Charterer prior to the acceptance of the Vessel by the Charterer and the Charterer shall reimburse the Owner all costs directly connected with the bunkering of the additional fuel, including but not limited to lighterage, dockage and similar charges, and related taxes thereto.

(b) The Charterer shall reimburse the Owner the cost of all fuel procured by the Owner and loaded in the Vessel during the period of this Charter. However, the Owner shall not be reimbursed any amount in excess of the current market price of such fuel at the place of loading plus all reasonable expenses incurred by the Owner in loading said fuel on board the Vessel. The title to all fuel for the cost of which the Owner (or Contractor) is entitled to be reimbursed hereunder shall automatically pass to and vest in the Charterer upon delivery to the Owner (or Contractor) or upon the happening of any other event by which title passes from the vendor or supplier thereof to the Owner (or Contractor), in the case of any such fuel which is purchased for the performance of this contract. The Charterer shall be afforded all benefits of Owner's contracts for its fuel requirements.

(c) The Charterer may supply or cause to be supplied any or all of the fuel required by the Vessel during the period of this Charter. The grade of such fuel is to be as specified by the Owner, or be subject to the Owner's approval and acceptance. If the Owner loads such fuel on the Vessel at his own expense, the Charterer shall reimburse the Owner reasonable cost of such loading.

(d) If the Vessel should go off-hire during the period of this Charter the Owner shall present to the Contracting Officer a statement certified by him or his authorized agent showing the amount of fuel on board at the time the off-hire period commenced and the amount of fuel on board when the off-hire period ended. The Charterer shall be credited for the cost of the fuel consumed during the off-hire period and also reasonable expenses incurred in loading such fuel, such costs to be based upon costs at the previous refueling point.

(e) Upon redelivery of the Vessel the Owner shall present to the Contracting Officer a statement certified by the Owner or his authorized agent showing the amount of fuel on board at the time of redelivery with such additional verification as the Contracting Officer may require and the Charterer shall be credited with the value of such fuel computed at the current market price at the port of redelivery.

(f) The term "current market price," as used in this Article, shall, in the case of United States ports (excluding ports of territories and possessions of the United States) mean the current market price as reported in "Platt's Oilgram" for the date of the particular loading, and such taxes on the fuel which the Owner is required to pay in addition to the price reported in "Platt's Oilgram." The term "current market price" in the case of foreign ports and ports of the territories and possessions of the United States shall mean the "current market price" as determined by the Contracting Officer. See Article 43 - Special Provisions (j)

(g) The term "reasonable expenses", as used in this Article, shall mean all reasonable costs which were necessarily incurred in loading fuel on board the Vessel, such as expenses incurred at tanker terminal, loading fuel from lighters,

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upon request an abstract of the daily entries in such log showing care given the cargo, courses steered, distances run on each course, noon position, distance made good each day from noon to noon, consumption of fuel, and remainder of fuel in the bunkers at the end of each day. Such abstract shall also contain appropriate meteorological data including the condition of the sea and a report of any marine casualty which results in damage to the cargo or in delay of the Vessel.

(h) The Charterer shall have permission to appoint a Super-cargo who shall be furnished with free accommodation on board, and same fare as provided for the Master's table. Charterer paying for subsistence at the rate of \$2.50 per day. Owner shall victual pilots and customs officers, and also, when authorized by Charterer, shall victual tally clerks, stevedore's foremen, etc. Charterer shall pay \$0.60 per meal for all such victualling and any steward's department overtime incurred as a result thereof.

(i) The Charterer shall have the privilege of carrying passengers as far as accommodations and United States Coast Guard certification allow, Charterer paying \$2.50 per day, per passenger, for accommodations and victualling, and also any steward's department extra remuneration and overtime, penalty time, accompanying fringe benefits, and taxes incurred, in accordance with the terms of Owner's labor agreements, incurred as a result of carrying such passengers.

(j) In addition to the personnel carried under Article 18(h) and 18(i) hereof, the Charterer shall have the privilege of assigning officers and/or enlisted men aboard the Vessel for duty purposes as far as accommodations and the United States Coast Guard certification allow, the Charterer paying \$2.50 per day per man for victualling and accommodations, and also additional crew wages, overtime, and subsistence expenses incurred by the Owner as the result of the carriage of such personnel as required by the Charterer under sub-sections (h), (i) and (j) of Article 18.

(k) The Charterer shall be liable to the Owner for any loss of the Vessel's fittings or appurtenances or any damage to the Vessel, her fittings, or appurtenances caused by the act of passengers, evacuees, or Charterer's personnel in the embarkation, carriage or debarkation of passengers, evacuees or Charterer's personnel to the extent such loss or damage is not payable under the Vessel's war risk policies; provided the Charterer shall not be liable for such damage unless written notice specifying such damage, and if obtainable, the name of the party or parties causing such damage shall have been given to the Charterer or its authorized representative within a reasonable time.

(l) The Vessel shall be equipped and rigged with test gastlines and blocks prior to arrival at ports where, because of climatic conditions, the use of hatch tests is customary.

(m) The Vessel shall provide sufficient cargo lights to equip working hatches with four portable lights, plus sufficient number of replacements in event of damage.

ARTICLE 19. The Master.

(a) The Master of Vessel, who shall be appointed by the Owner, shall be under the direction of the Charterer as regards the employment of the Vessel, but shall not be under Charterer's orders as regards navigation, care and custody of the Vessel and care of the cargo. The Master, officers and crew, in supervising the loading, stowage, trimming, securing or discharging of cargo shall be deemed the agents of the Charterer except insofar as such supervision pertains to the seaworthiness of the Vessel.

(b) The Master shall use diligence in caring for and ventilating the cargo.

(c) The Charterer shall furnish the Master with all requisite instructions and sailing directions, in writing. Should the Charterer elect to change these instructions of sailing directions after the Master has acted upon them in a reasonable and prudent manner, and the Owner incurs extraordinary expenses thereby, the Charterer shall reimburse the Owner for such expenses as were the direct result of change in such instructions or sailing directions.

ARTICLE 20. Statutory Exemptions.

(a) This contract is subject to all the terms and provisions of and all the exemptions from liability contained in Sub-sections (1), (2), and (3) of Section (4) of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936. For the purposes of this Contract, the term "Carrier" as used in said Act shall mean the "Owner" and the term "shipper" shall mean the "Government."

(b) Any provision of this contract to the contrary notwithstanding, the Owner and the Vessel shall have the benefit of all limitations of and exemptions from liability accorded to the Owner or demise Charterer of vessels by any Statute or rule of law for the time being in force.

(c) Neither the Owner nor any corporation owned by, subsidiary to, or associated or affiliated with the Owner shall be liable to answer for or make good any loss or damage to the goods occurring at any time and even though before

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loading on or after discharge from the Vessel, by reason or by means of any fire whatsoever, unless such fire shall be caused by its design or neglect.

ARTICLE 21. Exceptions.

The act^{of} God, enemies, fire, restraint of princes, rulers or people, and all dangers and accidents of the seas, rivers, machinery, boilers and steam navigation, and errors of navigation throughout this Charter Party always mutually excepted. The Vessel shall have the liberty to sail with or without pilots, to tow and to be towed, to assist vessels in distress, and to deviate for the purpose of saving life or property, or to go into drydock or into ways with or without cargo on board.

ARTICLE 22. Amended Jason Clause.

In the event of accident, danger, damage, or disaster, before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Owner is not responsible, by statute, contract, or otherwise, the cargo, shippers, consignees, or owners of the cargo shall contribute with the Owner in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the cargo. If a salving vessel is owned or operated by the Owner, salvage shall be paid for as fully as if such salving vessel or vessels belonged to strangers.

ARTICLE 23. General Average Clause.

General Average shall be adjusted, stated and settled, according to York-Antwerp Rules 1950, at such port or place in the United States as may be selected by the Owner, and as to matters not provided for by those Rules, according to the laws and usages at the port of New York. In such adjustment, disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship.

ARTICLE 24. Both-to-Blame Clause.

If the Vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the Owner in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder will indemnify the Owner against all loss or liability to the other or non-carrying ship or her owners insofar as such loss or liability represents loss of, or damage to or any claim whatsoever of the owners of said cargo, paid or payable by the other or non-carrying ship or her owners to the owners of said cargo and set off, recouped or recovered by other or non-carrying ship or her owners as part of their claim against the carrying Vessel or Owner. The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect to a collision or contact.

ARTICLE 25. Salvage.

All salvage moneys earned by the Vessel during the period of this Charter shall be divided equally between the Owner and the Charterer after deducting Master's, Officers' and Crew's shares, legal expense, hire of the Vessel during the time lost as a result of the salvage service, value of fuel consumed, repairs of damage, if any, and other extraordinary loss or expense sustained as a result of the salvage service.

ARTICLE 26. Redelivery.

(a) Unless lost, the Vessel shall be redelivered in accordance with paragraph (d) of Article 2. The Charterer shall give the Owner not less than 20 days notice (confirmed by telegram or letter) of the Vessel's expected date and range of redelivery and 10 days notice (confirmed by a telegram or letter) of the Vessel's actual port of redelivery. It shall be the duty of the Owner to minimize his expense during any period while the Vessel is in port subsequent to the receipt of the notice of redelivery and prior to the actual redelivery, crediting to the Charterer any savings.

(b) It shall be the duty of the Charterer to perform prior to redelivery of the Vessel, all repairs, removals and other work which under the terms of this contract are for the account of the Charterer; however, the Charterer may elect to redeliver the Vessel without performing such work, in which case the Owner will be given not less than 10 days notice of such election and the Charterer shall pay to the Owner sums to be agreed between the Owner and Contracting Officer representing (1) the estimated cost of performing such work and (2) charter hire and fuel cost for the time estimated to be necessary to perform such work, less any estimated savings the Owner would have been able to effect during such time. In the event the Charterer elects to redeliver the Vessel without performing the work for its account

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this contract shall be amended to reflect the amount of the payments to be made under this Article. Any failure to agree with respect to the amounts to be paid hereunder shall be deemed a Dispute and settled in accordance with Article 30. Storage of any Government owned property removed by the Owner under this Article shall be at the risk and expense of the Government.

(c) Savings, for the purposes of this Article, shall mean savings effected by the Owner in respect of: wages of Master, officers or crew; subsistence, computed at the rate of \$2.00 per day per man; miscellaneous savings, which shall be allowed whether or not actually effected and shall be computed at the rate of \$15.00 per day; and returns, if any, of insurance premiums (or in the case of self-insurers, a comparable amount), except that if the premium returns cover a continuous period of lay-up during only part of which full hire is payable, the Charterer shall be credited with such proportion of the returns as the period of full hire bears to the entire period of lay-up: Provided, however, that from the total of the savings to be credited to the Charterer in accordance with the foregoing, the Owner shall be entitled to deduct any substituted or extra expenses incurred for any subsistence, lodging and other expenses of maintaining the Master, officers or crew ashore. For the purpose of computing savings and expenses, any period of twelve (12) consecutive hours or less shall be disregarded and any period exceeding twelve (12) consecutive hours but less than twenty-four (24) hours shall be counted as one day.

ARTICLE 27. Charter Not a Demise.

Nothing herein contained shall be construed as creating a demise of the Vessel to the Charterer, the Owner under this Charter retaining complete and exclusive possession and control of the Vessel and its navigation.

ARTICLE 28. Officials Not to Benefit Clause:

No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE 29. Covenant Against Contingent Fees Clause:

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

ARTICLE 30. Disputes Clause:

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above: Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

ARTICLE 31. Convict Labor Clause.

In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor.

ARTICLE 32. Notice to the Government of Labor Disputes Clause.

(a) Whenever the Contractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Contractor shall immediately give notice thereof, including all relevant information with respect thereto, to the Contracting Officer.

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(b) The Contractor agrees to insert the substance of this clause, including this paragraph (b), in any subcontract hereunder to which a labor dispute may delay the timely performance of this contract; except that such subcontract shall provide that in the event its timely performance is delayed or threatened by delay by an actual or potential labor dispute, the subcontractor shall immediately notify its next higher tier subcontractor, or the prime contractor, as the case may be, of all relevant information with respect to such dispute.

ARTICLE 33: Nondiscrimination-In-Employment Clause:

(a) In connection with the performance of work under this Contract, the Contractor agrees as follows:

(1) The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: Employment, upgrading demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this non-discrimination clause.

(2) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(3) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the Agency Contracting Officer, advising the said labor union or workers' representative of the Contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The Contractor will comply with all provisions of Executive Order No. 10925 of March 6, 1961, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

(5) The Contractor will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, and by the rules, regulations, and orders of said Committee, or pursuant thereto, and will permit access to his books, records, and accounts by the Contracting Agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations and orders.

(6) In the event of the Contractor's non-compliance with the Nondiscrimination Clause of this Contract or with any of the said rules, regulations, or orders, this Contract may be cancelled in whole or in part and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 10925 of March 6, 1961, and such other sanctions may be imposed and remedies invoked as provided in the said Executive Order or by rule, regulation, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

(7) The Contractor will include the provisions of the foregoing paragraphs (1) through (6) in every subcontract or purchasing order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to Section 303 of Executive Order No. 10925 of March 6, 1961, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the Contracting Agency may direct as a means of enforcing such provisions, including sanctions for non-compliance. Provided, however, that in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Contracting Agency, the Contractor may request the United States to enter into such litigation to protect the interest of the United States.
See ANNEX "B", Paragraph 5

ARTICLE 34. Assignment of Claims Clause:

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U. S. Code 203, 41 U. S. Code 15), if this contract provides for payments aggregating \$1,000 or more, claims for moneys due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Unless otherwise provided in this contract, payments to an assignee of any moneys due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or set-off.

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(b) In no event shall copies of this contract or of any plans, specifications, or other similar documents relating to work under this contract, if marked "Top Secret", "Secret", or "Confidential", be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive the same. However, a copy of any part or all of this contract so marked may be furnished, or any information contained therein may be disclosed, to such assignee upon the prior written authorization of the Contracting Officer.

ARTICLE 35. Renegotiation Clause.

(a) To the extent required by law, this Contract is subject to the Renegotiation Act of 1951 (50 U. S. C. App. 1211, et seq.), as amended, and to any subsequent act of Congress providing for the renegotiation of contracts. Nothing contained in this clause shall impose any renegotiation obligation with respect to this Contract or any subcontract hereunder which is not imposed by an act of Congress heretofore or hereafter enacted. Subject to the foregoing, this contract shall be deemed to contain all the provisions required by Section 104 of the Renegotiation Act of 1951, and by any such other act, without subsequent contract amendment specifically incorporating such provisions.

(b) The Contractor agrees to insert the provisions of this clause, including this paragraph (b), in all subcontracts, as that term is defined in Section 103g of the Renegotiation Act of 1951, as amended.

ARTICLE 36. Examination of Records Clause:

(a) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract.

(b) The Contractor further agrees to include in all his subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontract. The term "subcontract" as used in this clause excludes (i) purchase orders not exceeding \$2,500.00 and (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

ARTICLE 37. Gratuities Clause:

(a) The Government may, by written notice to the Contractor, terminate the right of the Contractor to proceed under this Contract if it is found, after notice and hearing, by the Secretary or his duly authorized representative, that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by the Contractor, or any agent or representative of the Contractor, to any officer or employee of the Government with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performing of such contract; *Provided*, that the existence of the facts upon which the Secretary or his duly authorized representative makes such findings shall be in issue and may be reviewed in any competent court.

(b) In the event this Contract is terminated as provided in paragraph (a) hereof, the Government shall be entitled (i) to pursue the same remedies against the Contractor as it could pursue in the event of a breach of the contract by the Contractor, and (ii) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Secretary or his duly authorized representative) which shall be not less than three nor more than ten times the costs incurred by the Contractor in providing any such gratuities to any such officer or employee.

(c) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Contract.

ARTICLE 38. Military Security Requirements Clause:

(a) The provisions of this clause shall apply to the extent that this Contract involves access to information classified "Confidential" including "Confidential-Modified Handling Authorized" or higher.

(b) The Government shall notify the Contractor of the security classifications of this Contract and the elements thereof, and of any subsequent revisions in such security classification, by the use of a Security Requirements Check List (DI) Form 254), or other written notification.

(c) To the extent the Government has indicated as of the date of this Contract or thereafter indicates security classification under this Contract as provided in paragraph (b) above, the Contractor shall safeguard all classified

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elements of this Contract and shall provide and maintain a system of security controls within its own organization in accordance with the requirements of:

(i) the Security Agreement (DD Form 441), including the Department of Defense Industrial Security Manual for Safeguarding Classified Information as in effect on the date of this Contract, and any modification to the Security Agreement for the purpose of adapting the Manual to the Contractor's business; and

(ii) any amendments to said Manual made after the date of this Contract, notice of which has been furnished to the Contractor by the Security Office of the Military Department having security cognizance over the facility.

(d) Representatives of the Military Department having security cognizance over the facility and representatives of the contracting Military Department shall have the right to inspect at reasonable intervals the procedures, methods, and facilities utilized by the Contractor in complying with the security requirements under this Contract. Should the Government, through these representatives, determine that the Contractor is not complying with the security requirements of this Contract the Contractor shall be informed in writing by the Security Office of the cognizant Military Department of the proper action to be taken in order to effect compliance with such requirements.

(e) If, subsequent to the date of this Contract the security classifications or security requirements under this Contract are changed by the Government as provided in this clause and the security costs under this Contract are thereby increased or decreased, the freight shall be subject to an equitable adjustment by reason of such increased or decreased costs. Any such equitable adjustment shall be accomplished by appropriate modification of the Contract in writing. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of notice of the related change in any of the security classifications or security requirements under this Contract; provided, however, that where security requirements are changed pursuant to the provisions of any modification of the Security Agreement of the type referred to in paragraph (c) (i) above, the time for assertion of the Contractor's claim shall be measured from the date of such modification; and provided, further, that the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this Contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this Contract entitled "Disputes". However, nothing in this clause shall excuse the Contractor from proceeding with the Contract as changed.

(f) The Contractor agrees to insert, in all subcontracts hereunder which involve access to classified information, provisions which shall conform substantially to the language of this clause, including this paragraph (f) but excluding all of paragraph (e) of this clause except the first sentence thereof.

(g) The Contractor also agrees that it shall determine that any subcontractor proposed by it for the furnishing of supplies and services which will involve access to classified information in the Contractor's custody has been granted an appropriate facility security clearance, which is still in effect, prior to being accorded access to such classified information.

ARTICLE 39. Reduced Operational Status.

(a) The Charterer may at its option and upon notice to the Owner in accordance with the provisions of subparagraph (c) place the Vessel in reduced operational status in a continental United States port excluding Alaska. During any such period the rate of hire will be the reduced operational status rate as indicated in Article 2(e).

(b) During any such period of reduced operational status the Charterer shall have the privilege of performing repairs or other work for its account and the Owner shall have the privilege of performing voyage repairs or maintenance work for his account. If, however, during such period the performance of any such repairs or work for Owner's Account requires drydocking the Vessel, the payment of hire shall cease during the time the Vessel is on drydock and during the time required to move the Vessel to drydock and return to the point where she was placed in reduced operational status.

(c) The Charterer shall give the Owner written or telegraphic notice or in the event notice is given by telephone, written or telegraphic confirmation of exercise of the option specified in subparagraph (a) above. Such notice shall specify the time at which the period of reduced operational status is to commence, which time shall not be less than 48 hours subsequent to the receipt of such notice by the owner or his representative. The Charterer shall give the Owner written or telegraphic notice, or in the event notice is given by telephone, written or telegraphic, confirmation of termination of the period of reduced operational status. Such notice shall specify the time at which such period shall terminate, which time shall be at least 72 hours (Saturdays, Sundays and holidays excluded) subsequent to the receipt of said notice by the Owner or its representative. Provided, however, that by agreement between the Owner and the Charterer the Vessel may be returned to full operational status before the time specified in the notice of termination of the reduced operational period.

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... to terminate the period of reduced operational status before ten (10) days have elapsed the rate of hire shall not be reduced and hire shall continue as though the Vessel had never been placed in reduced operational status.

(e) With respect to any period covered by this Provision the Charterer shall reimburse the Owner for all expenses actually incurred by the Owner by reason of his agreements to provide return transportation for any officers or members of the crew signed off Articles during any such period (but not in excess of the amount set out in applicable agreements with recognized labor unions). The Charterer agrees to reimburse the Owner for all expenses necessarily incurred in accordance with the Owner's labor agreements for obtaining crew replacements at the time of the reactivation of the Vessel from idle status by the Charterer.

ARTICLE 40. Utilization of Small Business Concerns Clause:

(a) It is the policy of the Government as declared by the Congress that a fair proportion of the purchases and contracts for supplies and services for the Government be placed with small business concerns.

(b) The Contractor agrees to accomplish the maximum amount of subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this contract.

ARTICLE 41. Definitions.

(a) As used throughout this contract, the following terms shall have the meanings set forth below:

(1) The term "Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of the Department, and the Head or any assistant head of the Federal Agency, and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the Secretary.

(2) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is properly designated Contracting Officer, and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

(3) Wherever, under this contract, provision is made for the Charterer to assume, reimburse or pay wages, extra wages, bonuses or overtime to vessel personnel, such obligation shall include related taxes and insurance applicable to such payments.

(4) Except as otherwise provided in this contract, the term "subcontracts" includes purchase orders under this contract.

ARTICLE 42. Soviet-Controlled Areas Clause:

(a) The Contractor shall not acquire for use in the performance of this Contract any supplies or services originating from sources within Soviet-controlled areas, as listed below, or from Hong Kong or Macao, without written approval of the Contracting Officer.

(b) The Contractor agrees to insert the provisions of this clause, including the Soviet-controlled areas listed below and this subparagraph (b), in all subcontracts hereunder.

(c) For the purpose of this clause, soviet-controlled areas are the following:

Albania, Bulgaria, China, excluding Taiwan (Formosa), but including Manchuria, Inner Mongolia, the provinces of Tsinghai and Sinking, Tibet, the former Kwantung Leased Territory, the present Port Arthur Naval Base Area, and Lianing Province. Communist-controlled area of Viet Nam and Communist-controlled area of Laos. Czechoslovakia, East Germany (Soviet Zone of Germany and the Soviet Sector of Berlin). Estonia, Hungary, Latvia, Lithuania, North Korea, Outer Mongolia, Poland and Danzig, Rumania, Union of Soviet Socialist Republics, Cuba.

ARTICLE 43. Special Provisions.

(a) The attached WAR RISK ADDENDUM TO MTS STANDARD TIME CHARTER is made a part of this contract and shall prevail over any other provisions herein inconsistent therewith.

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Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.

ARTICLE 43. Special Provisions (Continued).

(b) Ship will be equipped with a full set of cargo battens and clips at Owner's time and expense.

(c) In the event shore liberty is not permitted by the military commander ashore, the master of the ship shall be advised promptly in writing of this restriction by the shore commander.

(d) In addition to the carriage of personnel noted in Article 18, Charterer shall have the right to assign other military personnel aboard the vessel. Such personnel not to require victualling, berthing or sanitary facilities from the ship unless requested by the military commander aboard, in which case the Owner will be reimbursed out of pocket expenses.

(e) Charterer will supply life floats and jackets for the use of military personnel carried aboard the ship during the charter period. Such items to be removed by Charterer at termination of charter.

(f) Cargo may include gasoline and diesel engine vehicles all preloaded with cargo and with batteries connected and fuel tanks 3/4 filled.

(g) The Charterer will obtain necessary Coast Guard waivers.

(h) The additional Mandatory Clauses attached hereto as ANNEX "B" are made part of this contract.

(i) Communication Capability attached hereto as ANNEX "C" is made part of this contract.

(j) The term "current market price" as used in Article 16 shall mean the price for the date of the particular loading as reported in current "Price List for Marine Fuel Oils" issued by Esso International, Inc. or the Owner's contract price, whichever is lower and such taxes on the fuel which the Owner is required to pay. At ports where the Owner has no contract for fuel and where "Current Price List for Marine Fuel Oils" is not applicable, the "current market price" shall be as determined by the Contracting Officer.

(k) Any time lost by the vessel during this charter party due to breakdown of machinery, interference by authority, collision, stranding, fire or other accidents or damage to the vessel, or repairs, inspections and overhaul, preventing the work of the vessel shall be added to the charter period at the Charterer's option, declarable 30 days prior to the termination of the charter period.

(l) The Contractor agrees that any refunds, rebates, credits or other amounts (including any interest thereon) accruing to or received by the Contractor under this contract shall be paid by the Contractor to the Government to the extent that they are properly allocable to costs, expenses or reimbursements for which the Contractor has been reimbursed by the Government under the terms of this contract.

(Continued on Page 19)

Each of the provisions of this Charter Party shall be deemed severable, if any provision or part of any provision should be held invalid, illegal or unenforceable, the remaining provisions or part of any provisions shall continue in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this contract as of the day and year first above written.

BATTERY STEAMSHIP CORP

THE UNITED STATES OF AMERICA

BY

VICE PRESIDENT

(Title)

BY

Contracting Officer

Military Sea Transportation Service
Department of the Navy

CERTIFICATE

I, DAVID W. SWANSON, certify that I am the PRESIDENT of the corporation named as Contractor herein; that IVO MATKOVIC who signed this contract on behalf of the Contractor was then VICE PRESIDENT of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

IN WITNESS WHEREOF, I have hereunto affixed my hand and the seal of said corporation this SECOND day of MAY 1967.

(CORPORATE SEAL)

ONLY COPY AVAILABLE

*Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.*

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1. PERSONNEL.

The Charterer shall reimburse the Owner for its actual out-of-pocket expenses including all taxes with respect thereto for which the Owner is responsible by reason of applicable collective bargaining agreements or by compliance with orders of any duly authorized agency of the Government for (a) any war risk bonuses, extra wages based on the areas to be traversed during, or the port of call of, any voyage hereunder; (b) any extra wages arising out of the nature of any cargo carried for the account of the Charterer; (c) any required payments to the officers or crew of the Vessel necessarily incurred by reason of orders or direction of the Government which require the Owner to breach existing Articles of the crew or Contracts with the officers; (d) all wages, overtime, subsistence, bonus of extra officers and men beyond the normal complement of the Vessel as of the date of the Charter party, who are employed, because of the special requirements of the Vessel's service under this contract, including all personnel necessary to provide for persons carried at the request of the Charterer; (e) any repatriation costs including wages and maintenance necessarily incurred by the Owner by reason of a voyage terminating outside of the continental limits of the United States or in Alaska, unless such termination was the result of the willful fault of the Owner or Master, and only to the extent not covered by insurance; (f) all wages and overtime paid to security watchman provided in compliance with any security requirements of the United States or other Government, and all overtime or additional wages paid to the officers or crew by reason of compliance with such requirements; (g) all wages and bonuses payable in case of loss of the Vessel through the date of loss is unknown but only to the extent not covered by insurance.

2. INSURANCE.

a. The Charterer shall reimburse the Owner for:

(i) The cost of full war risk insurance on hull and machinery based upon the aggregate valuation of the Vessel stated in the marine risk insurance policy or policies carried by the Owner on 23 April 1965; or if no marine insurance was carried on that date such valuation as shall be agreed upon by the Owner and the Contracting Officer. Any failure to so agree shall be deemed a Dispute and shall be settled in accordance with Article 30.

(ii) War risk insurance on the lives of or for injuries to officers and crew and loss or damage to their personal effects, including sextants of deck officers: *Provided, however,* that such reimbursement shall be reduced by the premiums payable as of 27 March 1967 on war risk insurance on the officers and crew in the form of Second Seamen's War Risk Policy, amended, providing payment in the amount of \$5,000 for loss of life.

(iii) War risk insurance on leased equipment on board for which the Owner is responsible, on slop chests, on the actual value of the Vessel's unused consumable stores, and on cash carried on board not in excess of \$5,000 unless otherwise agreed.

(iv) War risk protection and indemnity insurance for the benefit of the Owner and Charterer as their interests may appear, including Owner's liabilities to officers and crew until repatriated.

(v) The excess, if any, of the amount of the premium actually incurred by the Owner for (i) marine risk hull and protection and indemnity insurance on the vessel for the period of its service under this contract, (ii) the Second Seamen's Insurance Policy, or additional insurance coverage that may be required in accordance with the Owner's labor agreements, over such amount as would have been incurred for such insurance, if the policies excluded trade to areas in which hostilities involving the United States are in progress and to which service is contemplated under the contract but permitted trade elsewhere within American Institute Trade Warranties.

b. If the Owner is a self-insurer, the Charterer shall pay to the Owner a sum equivalent to the actual cost of war risk insurance mentioned above.

c. In the event all or any part of the insurance of any description on the Vessel shall become vitiated, suspended, lapsed or terminated from any cause arising out of or as a result of orders, acts or omissions of the Charterer or any persons acting for the Charterer, the Charterer shall indemnify the Owner against any loss, damage or expense suffered or sustained by him as a result of such vitiation, suspension, lapse or termination: *Provided, however,* that the Owner shall credit the Charterer with any savings in respect of such premiums from the time of such vitiation, suspension, lapse or termination.

d. In the event all or any part of the war risk insurance on the Vessel or its crew expires, whether by reason of the automatic termination clause of the policies or otherwise, and the Owner is unable to obtain adequate coverage either from the Government or commercial underwriters, the Charterer agrees to indemnify the Owner against any loss, damage or expense incurred by the Owner or the Vessel which, but for the termination for such insurance, would have been covered thereby.

*Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.*

... (action) under the direction of naval, military, coast guard or other governmental authorities, in salvaging or alongside ships or into ships except fighters, or ice if loss of time due to ice damage does not result from willful negligence or default of the Owner, Master, Officers or crew; or

(ii) Time lost when the Vessel needs repairs necessary to keep her working) (1) due to lack of available repair facilities in a port outside the continental United States or a port in Alaska, or (2) due to the Vessel's having to leave a port outside the continental United States or a port in Alaska to go to another port for such repairs when the facilities for such repairs at the port so left would not have been available in the time required to proceed to and return from such other port. *Provided, however,* that if the repairs were necessitated by a cause other than those specified in (i), no demurrage shall be paid for the period which would have been necessary to place the Vessel in a seaworthy condition if adequate repair facilities had been available. The period which would have been necessary for such repairs if adequate facilities had been available shall be agreed upon between the Owner and the Contracting Officer and no failure to so agree shall be deemed a Dispute and shall be settled under Article 30.

b. For the time for which the Owner receives full hire under this Article it shall be the duty of the Owner to redeliver the vessel to the Charterer. Savings, for the purpose of this paragraph, shall have the same meaning as that set out in Article 45(c) of this Contract.

c. If a general average situation arises and the Owner becomes entitled to recover in General Average from bull underwriters, cargo, or other interests in the adventure for sacrifices of wages, stores, or other like expenditures which would otherwise be for the account of the Owner under this Contract, the Charterer shall be credited with any recovery obtained by the Owner in respect of all such expenditures incurred by the Owner during any period when the Charterer is liable to the Owner for hire under the terms of this Article.

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*Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.*

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ARTICLE 43. Special Provisions (Continued from page 15)

(m) Priorities Clause. Pursuant to authority of the Defense Production Act of 1950 as amended and provisions of Business and Defense Services Administration Regulation No. 1, priority rating DO A-3 shall be used to obtain ratable ships' stores and controlled snipe' materials required under this contract.

(n) Overtime Clause. Any time the vessel is detained in a port or a hold position awaiting discharge for a period in excess of 10 days through no fault of the Contractor, the Government shall reimburse the Contractor commencing after the tenth day, for watch standing overtime of officers only on weekdays (Saturdays, Sundays and holidays excepted) necessarily incurred in accordance with Union Agreements during the period sea watches are broken. The period referred to above shall be cumulative during any one voyage while awaiting discharge, and such overtime payable under this clause shall cease while the vessel is discharging at any given port.

(o) Launch Hire Clause. If overtime is payable by the Government under the above clause, launch hire costs during the same period, incurred in accordance with Union Agreements, shall be payable by the Government except that such costs for Saturday, Sunday and holidays shall also be for the Government's account.

(p) Escalation Clause.

(1) The Contractor warrants that the freight rate does not include any contingency allowance to cover the possibility of increased cost of performance resulting from increases in (1) the manning scale and ratings constituting the Vessel's complement as set forth in Schedule A, by reference incorporated herein, or (2) the total wages payable to the Vessel's complement as set forth in Schedule A; or (3) the cost of subsistence as set forth in Schedule B, by reference incorporated herein; or (4) the cost of the Vessel's stores as set forth in Schedule B. The Charterer and Contractor agree that increases or decreases in cost of performance shall be subject to escalation upward or downward as set forth in (3) through (4) below. It is agreed that escalation shall not become effective until date vessel is accepted on hire, but that the base date for escalation purposes shall be 27 March 1967 the contractor paying for any increases in items covered by escalation prior to date vessel accepted on hire. Schedules A and B referred to above shall be submitted by the Contractor showing costs on 27 March 1967.

(2) For the purpose of this clause (i) the term "total wages" includes but is not limited to basic wages, pension and welfare costs, vacation pay, and any other fringe benefits or other payments, and related taxes, paid as a result of collective bargaining agreements, and the respective percentages of the overtime for each department of the vessel, all as set forth in Schedule A; provided, however, that if a revision of any such agreement makes an adjustment in overtime hours as a result of a change of the work week or in fringe benefits and by reason thereof, the Contractor pays total wages in excess of or less than those set forth in Schedule A, "total wages" shall include all overtime incurred by reason of such adjustment; (ii) the term "stores" means the stores of the Deck, Engine, or Stewards Department of the vessel; (iii) the term "subsistence" means the provisions used in subsisting the crew members.

(3) In the event that after 27 March 1967 the price for stores and subsistence shall be in excess or less than the prices shown in Schedule B, upon commencement of the effective date, payment will be made by the Charterer or credits by the Contractor for adjustments upward or downward in accordance with the procedures set forth in Schedule B.

(4) In the event that after 27 March 1967 the Contractor shall be required to pay, as a result of collective bargaining agreements total wages to the vessel's complement in excess or less than those shown in Schedule A, commencing upon the effective date, payment will be made by the Charterer or credits by the Contractor for adjustments upward or downward, not less frequently than every three months.

(5) Failure of the parties to agree upon an adjustment as provided in this clause shall be deemed to be a dispute as to a question of fact within the meaning of the clause entitled "Disputes."

*Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.*

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1. Interest (May 1963). Notwithstanding any other provision of this contract, unless paid within 30 days all amounts that become payable by the Contractor to the Government under this contract (net of any applicable tax credit under the Internal Revenue Code) shall bear interest at the rate of six percent per annum from the date due until paid and shall be subject to adjustments as provided by Part 6 of Appendix E of the Armed Services Procurement Regulation, as in effect on the date of this contract. Amounts shall be due upon the earliest one of (i) the date fixed pursuant to this contract, (ii) the date of the first written demand for payment consistent with this contract, (iii) the date of transmittal by the Government to the Contractor of proposed supplemental agreement to confirm completed negotiations fixing the amount, or (iv) if this contract provides for revision of prices, the date of written notice to the Contractor stating the amount of refund payable in connection with a pricing proposal or in connection with a negotiated pricing agreement not confirmed by contract supplement.

2. Price Reduction for Defective Cost or Pricing Data--Price Adjustments (March 1963).

(a) This clause shall become operative only with respect to any change or other modification made pursuant to one or more provisions of this contract which involves a price adjustment in excess of \$100,000, except where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. The right to price reduction under this clause shall be limited to such price adjustments.

(b) If the Contracting Officer determines that any price, including profit, or fee, negotiated in connection with any price adjustment under this contract was increased by any significant sums because the Contractor or any subcontractor in connection with a subcontract covered by paragraph (d) below, furnished incomplete or inaccurate cost or pricing data or data not current as of the date of execution of the Contractor's Certificate of Current Cost or Pricing Data, then such price shall be reduced accordingly and the contract shall be modified in writing to reflect such adjustment.

(c) Failure to agree on a reduction shall be a dispute concerning a question of fact within the meaning of the "Disputes" clause of this contract.

(d) The Contractor agrees to insert the substance of paragraphs (a), (b) and (d) of this clause in each subcontract hereunder that exceeds \$100,000.

3. Audit--Price Adjustments (Sep. 1964).

(a) This clause shall become operative only with respect to any change or other modification made pursuant to one or more provisions of this contract which involves a price adjustment in excess of \$100,000, unless the price adjustment is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

(b) For purposes of verifying that cost or pricing data submitted in conjunction with a contract change or other modification involving an amount in excess of \$100,000 are accurate, complete and current, the Contracting Officer, the Comptroller General of the United States, or any authorized representatives, shall--until the expiration of three years from the date of final payment under this contract--have the right to examine those books, records, documents and other supporting data which will permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein, which were available to the Contractor as of the date of execution of the Contractor's Certificate of Current Cost or Pricing Data.

(c) The Contractor agrees to insert the substance of this clause in all subcontracts hereunder in excess of \$100,000 so as to apply until three years after final payments under the subcontract and only when the change or other modification to the subcontract results from a change or other modification to the Government prime contract.

4. Subcontractor Cost and Pricing Data--Price Adjustments (May 1963).

(a) Paragraphs (b) and (c) of this clause shall become operative only with respect to any change or other modification made pursuant to one or more provisions of this contract which involves a price adjustment in excess of \$100,000. The requirements of this clause shall be limited to such price adjustments.

*Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.*

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(b) The Contractor shall require subcontractors hereunder to submit cost or pricing data under the following circumstances: (i) prior to award of any cost-reimbursement type, incentive, or price redetermination subcontract; (ii) prior to the award of any subcontract the price of which is expected to exceed \$100,000; (iii) prior to the pricing of any subcontract change or other modification for which the price adjustment is expected to exceed \$100,000; except in the case of (ii) or (iii) where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

(c) The Contractor shall require subcontractors to certify that to the best of their knowledge and belief the cost and pricing data submitted under (b) above is accurate, complete, and current as of the date of execution, which date shall be as close as possible to the date of agreement on the negotiated price of the contract modification.

(d) The Contractor shall insert the substance of this clause including this paragraph (d) in each subcontract hereunder which exceeds \$100,000.

5. Equal Opportunity Clause (Apr. 1964).

(The following clause is applicable unless this contract is exempt under the rules and regulations of the President's Committee on Equal Employment Opportunity (41 C.F.R. Chapter 60)). Exemptions include contracts and subcontracts (i) not exceeding \$10,000, (ii) not exceeding \$100,000 for standard commercial supplies or raw materials, and (iii) under which work is performed outside the United States and no recruitment or workers within the United States is involved.

During the performance of this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; lay-off or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this nondiscrimination clause.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(c) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Agency Contracting Officer, advising the said labor union or workers' representative of the Contractor's commitments under this nondiscrimination clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order No. 10925 of March 6, 1961, as amended, and of the rules, regulations, and relevant orders of the President's Committee on Equal Opportunity created thereby.

(e) The Contractor will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, as amended, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's noncompliance with the nondiscrimination clause of this contract or with any of the said rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 10925 of March 6, 1961, as amended, and such other sanctions may be imposed and remedies invoked as provided in the said Executive Order or by rule, regulation, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

*Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.*

(f) The Contractor will include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to section 303 of Executive Order No. 10925 of March 6, 1961, as amended, so that such provisions will be binding upon each subcontractor or vendor. *The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, that in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interest of the United States.

*Unless otherwise provided, the "Equal Opportunity" clause is not required to be inserted in subcontracts below the second tier, except for subcontracts involving the performance of "construction work" at the "site of construction" (as those terms are defined in the Committee's rules and regulations) in which case the clause must be inserted in all such subcontracts. Subcontracts may incorporate by reference the "Equal Opportunity" clause.

(Reference in Clause 5. above to "President's Committee on Equal Employment Opportunity" shall be read as "Secretary of Labor," and reference to "Executive Order No. 10925" shall be read as "Executive Order 11246 of 24 September 1965.")

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*Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.*

(Revised January 1967)

"ANNEX C"

Communications Capability. The Owner represents that the Vessel is equipped with the following minimum communications capability and further agrees to install additional radio crystals as may later be required by the Charterer:

- (1) A radiotelegraph station as outlined in Subpart R, Part 83 of the Federal Communications Commission Rules and Regulations as evidenced by a current Cargo Ship Safety Radiotelegraphy Certificate and/or FCC Station License.
- (2) One radio receiver, high-frequency: Minimum frequency range 2-24 MCS, A-1/A-2/A-3 emission. (SEPARATE FROM MAIN RECEIVER)
- (3) One radio transmitter, high-frequency: Minimum frequency range 2-24 MCS, A-1 emission.
- (4) One HF radiotelephone transmitter/receiver: Minimum frequency range 2-3 MCS, A-3 emission.
- (5) Crystals for operation on the following output frequencies: (ALTERNATE MEANS OF FREQUENCY CONTROL PERMITTED PROVIDED THAT FREQUENCY TOLERANCES NOT EXCEEDED)

<u>MF Transmitter</u>	<u>HF Transmitter</u>	<u>HF Radiotelephone Transmitter/Receiver</u>
432 KCS	2836.0 KCS	2670.0 KCS
444 KCS	4150.0 KCS	2716.0 KCS
468 KCS	4289.0 KCS	2350.0 KCS
	6453.0 KCS	2825.0 KCS
	8578.0 KCS	2182.0 KCS
	12867.0 KCS	2550.0 KCS
	17156.0 KCS	2738.0 KCS
	22443.0 KCS	3216.0 KCS (where equipment characteristics permit)

The above requirements are not intended to restrict the utilization of the installed radio equipment for normal communications on other assigned or required frequencies.

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*Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.*

WASHINGTON, D. C. 20390

S.S. "ELWELL"

Contract No. N0003367TC421

Amendment No. 1

Date: 22 Nov 67

THIS AGREEMENT entered into this date between the UNITED STATES OF AMERICA (hereinafter called the "Government") represented by the Contracting Officer executing this document and BATTERY STEAMSHIP CORP. (hereinafter called the "Contractor")

WITNESSETH THAT

WHEREAS the Government and the Contractor entered into Contract N0003367TC421 for the time charter of the S.S. "ELWELL" hereinafter called the "ship", which provides in the WAR RISK ADDENDUM that the Government shall reimburse the Contractor for war risk bonuses for which the Contractor is responsible by reason of applicable collective bargaining agreements, and

WHEREAS existing collective bargaining agreements provide for war risk bonus payments to crew members aboard vessels traversing a South East Asia area more definitely defined in the bargaining agreement and therefore the Government has become obligated under the aforementioned contract provision for these bonuses, and

WHEREAS the Government and the Contractor have agreed that in order to reduce administrative overhead and facilitate such war risk bonus payments, such payments will be computed and paid on the terms and conditions as set forth below.

NOW, THEREFORE, it is mutually agreed as follows:

1. The ship is a C-2 type vessel which in accordance with manning and wage scales requires a complement of 42 personnel. Under the provisions of this scale the combined daily wage of its officers and crew is \$ 773.79. Social Security and other applicable taxes on this daily wage are subject to fluctuation. The contractor has agreed to 6% as settlement of these taxes on an agreed base rate including wages and all taxes of \$ 820.00.
2. The daily wage computed as above shall be the base rate for computation of war bonuses required in accordance with existing collective bargaining agreements which provide for the payment of 100% of base pay.
3. The foregoing base rate shall be subject to downward adjustment in the event the complement of the vessel, on any voyage for which area bonuses are claimed, was less than provided in the manning and wage scale.
4. The base rate shall be subject to an adjustment upward or downward in the event the wage scale or vessel's complement is increased or decreased as a result of a collective bargaining agreement. Such increase or decrease in the event of a change in basic wages shall be re-computed and shall be effective on the commencement date defined in the collective bargaining agreement.

*Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.*

time after the ship leaves the bonus area or at thirty (30) day intervals if the ship is detained in the bonus area.

The procedure for preparing such Invoices will be as follows:

Invoices will contain certification as to the dates of entry and departure into and from the bonus area, or notation that the ship is being detained in the area. The amount of the Invoice will be computed on the days in the area at the base rate per day with proper deductions if the vessel's complement was less than indicated in the manning and wage scale.

Each Invoice will contain the following certification:

"The Contractor certifies that the foregoing period the ship was in the bonus area and the complement of the ship during this period as indicated above are both true and correct. The Contractor further certifies that the amount claimed was based on the period and complement as shown and is properly owing in accordance with Amendment No. 1 to Contract N0003367TC421."

This procedure may be changed by mutual agreement.

6. This amendment shall be deemed cancelled on the effective date of the deletion from collective bargaining agreements of the requirement to pay area bonuses or a determination that further payment of area bonuses is no longer warranted in the area as defined in collective bargaining agreements in force on the effective date of this amendment.

7. All other terms and conditions of the contract remain the same.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment as of the day and year first above written.

BATTERY STEAMSHIP CORP.

BY *Ivo Matkovic*
VICE PRESIDENT
(Title)

THE UNITED STATES OF AMERICA

BY *W. H. ...*
Contracting Officer
Military Sea Transportation Service
Department of the Navy

CERTIFICATE

I, DAVID W. SWANSON, certify that I am the PRESIDENT of the corporation named as Contractor herein; that IVO MATKOVIC who signed this Amendment on behalf of the Contractor, was then VICE PRESIDENT of said corporation; that said Amendment was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

IN WITNESS WHEREOF, I have hereunto affixed my hand and the seal of said corporation this 22nd day of November 1967.

(CORPORATE SEAL)

David W. Swanson

*Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.*

DATED: 22 Nov 67

S.S. "ELWELL"

Contract No. N0003367TC421

SCALE OF WAGES AND MANNING TABLE FOR CREW MEMBERS

Enclosed with
Amendment #1

AS OF June 16, 1967 as Modified 9/25/67

NO	OFFICERS AND CREW	BASE RATE PER MONTH	BASE RATE PER MONTH PLUS 6%	DAILY RATE PER MAN	DAILY RATE PER MAN PLUS 6%	
1	MASTER	1741.62	1846.12	58.054	61.537	1
2	1 CH MATE	1059.55	1123.12	35.318	37.437	2
3	1 2nd MATE	749.90	794.89	24.997	26.497	3
4	2 3rd MATE (692.33)	1384.66	1467.74	23.078	24.463	4
5	1 BOATSWAIN	555.27	588.59	18.509	19.620	5
6	1 DECK MAINTENANCE	471.99	500.31	15.733	16.677	6
7	6 ABLE SEAMEN (422.58)	2535.48	2687.61	14.086	14.931	7
8	3 ORDINARY SEAMEN (329.90)	989.70	1049.08	10.997	11.657	8
9	1 RADIO OPERATOR	851.60	902.70	28.387	30.090	9
10	1 CH. ENGINEER	1311.17	1389.84	43.706	46.328	10
11	1 1st ASSISTANT ENGINEER	849.55	900.2	28.318	30.017	11
12	1 2nd ASSISTANT ENGINEER	749.90	794.89	24.997	26.497	12
13	3 3rd ASSISTANT ENGINEER (692.33)	2076.99	2201.61	23.078	24.463	13
14	1 ELECTRICIAN	653.37	692.57	21.779	23.086	14
15	3 FIREMAN-WATERTENDER (422.58)	1267.74	1343.80	14.086	14.931	15
16	3 OILER (422.58)	1267.74	1343.80	14.086	14.931	16
17	2 WIPER (392.47)	784.94	832.04	13.082	13.867	17
18	1 CHIEF STEWARD	555.27	588.59	18.509	19.620	18
19	1 CHIEF COOK	493.46	523.07	16.449	17.436	19
20	1 2nd COOK/BAKER	480.95	509.81	16.032	16.994	20
21	1 3rd COOK	417.61	442.67	13.920	14.755	21
22	6 MESSMAN (327.56)	1965.36	2083.28	10.919	11.574	22
23	TOTALS	23,213.82	24,606.65			
24	TOTAL PER DAY (ACTUAL)	\$ 773.79	\$ 820.21			
25	TOTAL PER DAY TO NEAREST \$10.00	\$ 780.00	\$ 820.00			
26	() Apprentice Engineer	200.00	212.00	6.667	7.067	26
27	UNIONS: M.M.&P. - M.E.B.A. - A.R.A. - N.M.U.					

Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.

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CERTIFICATE

This is to certify that, to the best of my knowledge and belief, the above manning and wage scale of the S.S. "ELWELL" submitted to the Contracting Officer in support of my request for expeditious payment of area bonuses, is accurate, complete and current as of the date of execution of this certificate.

For purposes of verifying that the above data is accurate, complete and current, the Contracting Officer or his authorized representative, until the expiration of three (3) years from the date of final payment under this contract, shall have the right to examine any books, records, documents or other supporting data of the Contractor which will permit adequate evaluation of the above data along with any computations which were available to the Contractor as of the date of execution of the above certificate.

22 Nov 67

(Date of Execution)

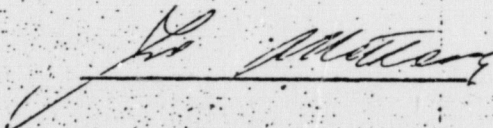


Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.

FIRST ORIGINAL

DEPARTMENT OF THE NAVY
MILITARY SEA TRANSPORTATION SERVICE
WASHINGTON, D. C. 20390

S. S. ELWELL
Amendment No. 2
Contract N0003367TC421
Date June 4, 1968

THIS AGREEMENT entered into this date between the UNITED STATES OF AMERICA (hereinafter called the "Government") represented by the Contracting Officer executing this document and Battery Steamship Corp (hereinafter called the "Contractor")

WITNESSETH THAT

WHEREAS the Government and the Contractor entered into Contract N0003367TC421 for the time charter of the S.S. ELWELL (hereinafter called the "Vessel"). The contract provides in Article 10 and Article 43(n) that the Government shall reimburse the Contractor for certain categories of overtime and penalty time wages paid to the officers and members of the Vessel's crew in accordance with the terms of the Contractor's labor agreements, and

WHEREAS the Government and the Contractor have agreed that, in order to reduce administrative overhead and facilitate overtime payments which are otherwise for the account of the Government, overtime and penalty time payments will be computed on the basis of a flat daily rate and paid on the terms and conditions set forth below.

NOW, THEREFORE, it is mutually agreed as follows:

1. Retroactive to and commencing on 16 June 1967, in lieu of the payment of actual overtime and penalty time otherwise for the account of the Government under the provisions of Article 10(b), (c), (d), (e), (f) and Article 43(n), the Government shall pay the Contractor \$42.00 per day or pro rata for part thereof for all periods the Vessel is on-hire except for those periods for which the Government has reimbursed the Contractor for overtime and penalty time.
2. Expenses for overtime and penalty time otherwise for the account of the Government and incurred between 16 June 1966 and 16 June 1967 shall be settled by the Government paying to the Contractor \$35.00 per day or pro rata for part thereof for all periods the Vessel was on-hire except for those periods for which the Government has reimbursed the Contractor for overtime and penalty time.
3. The aforementioned provisions for payment shall not be applicable during any period the Vessel is off-hire.
4. The aforementioned lump sum payments shall not apply to overtime or penalty time incurred as a result of emergency alerts caused by military action where the Government or its representative has requested in writing or confirmed in writing that the officers and crew members remain aboard the Vessel. Under these circumstances actual overtime or penalty time incurred shall be for the account of the Government and payments made based on submission of invoices and supporting documentation. For any period the Contractor shall be entitled to payment under this paragraph 4, it shall not be entitled to the \$42.00 per day set forth in paragraph 1 above.
5. The foregoing lump sum payments set forth in paragraph 1 above shall be subject to renegotiation in the event of increases in overtime and penalty time rate or changes in work rules resulting from changes in the Contractor's labor agreements.
6. All other terms and conditions of the contract remain the same.

Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment as of
the day and year first above written.

Ivo Matkovic
BY IVO MATKOVIC
VICE PRESIDENT
(Title)

W. H. Marshall
BY THE UNITED STATES OF AMERICA
Contracting Officer
Military Sea Transportation Service
Department of the Navy

CERTIFICATE

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Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.

ONLY COPY AVAILABLE

DEPARTMENT OF THE NAVY
MILITARY SEA TRANSPORTATION SERVICE
WASHINGTON, D. C. 20390

SS ELWELL
Amendment No. 3
Contract No. N0003367TC421
7 August 1968

THIS AGREEMENT entered into this date between the UNITED STATES OF AMERICA (hereinafter called the "Government") represented by the Contracting Officer executing this document and BATTERY STEAMSHIP CORP. (hereinafter called the "Contractor")

WITNESSETH THAT

WHEREAS the Government and the Contractor entered into Contract N0003367TC421, as amended, for the time charter of the SS ELWELL for a period of from about twelve (12) to about fifteen (15) months or termination of the voyage then current, charterer's option, and

WHEREAS the Government and the Contractor have agreed that the vessel shall be redelivered on arrival Pilot Station Puget Sound or equivalent distance to Pilot Station Columbia River, Contractor's option, vice U. S. Gulf, on the terms and conditions set forth below.

NOW, THEREFORE, Contract N0003367TC421, as amended, is further amended as follows:

1. Upon termination of the contract period, the vessel shall be redelivered on arrival Pilot Station Puget Sound or equivalent distance to Pilot Station Columbia River, Contractor's option, vice U. S. Gulf. Contractor to nominate range of redelivery 5 days prior to arrival of vessel in the Pacific North West.
2. The Government shall pay the Contractor \$11,500 in consideration for the change in redelivery.
3. Repatriation of the crew shall be for the Contractor's account.
4. The Contractor waives all damage claims except those based on damage reports submitted with the Contractor's letter dated 5 August 1968.
5. The Contractor waives redelivery notices.
6. No off-hire survey will be conducted except notation of fuel on board on arrival at redelivery point.
7. Prior to proceeding to the redelivery point, the Government shall remove all sheathing, if any, and broom sweep at Inchon, Korea, and upon completion thereof, the vessel shall proceed promptly to the redelivery area.
8. All other terms and conditions of the contract remain the same.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment as of the day and year first above written.

BATTERY STEAMSHIP CORP.

BY [Signature]

Vice President
(Title)

THE UNITED STATES OF AMERICA

BY [Signature]

Contracting Officer
Military Sea Transportation Service
Department of the Navy

37a

*Exhibit A, Contract No. N0003367TC421 with
Amendments 1, 2 and 3.*

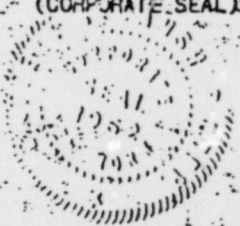
CERTIFICATE

I, David W. Swanson, certify that I am the President of corporation named as Contractor herein; that Ivo Matkovic who signed this amendment on behalf of the Contractor was then Vice President of said corporation; that said amendment was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

IN WITNESS WHEREOF, I have hereunto affixed my hand and the seal of said corporation this 19 day of Sept. 1968.

David W. Swanson

(CORPORATE SEAL)



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38a

Exhibit B, Letter Dated August 5, 1968.

JAMES W. ELWELL & CO., INC.
 FOUNDED 1821
 SHIPOWNERS AND OPERATORS

80 BROAD STREET

NEW YORK, N. Y. 10004

FILE ADDRESS
ELL NEW YORK;TELEPHONE
HA 5-4240
TWX
~~XXXXXXXX~~

August 5, 1968

Commander
 MSTS
 Department of the Navy
 Code 10-3
 Washington D. C. 20390

Re: S. S. Elwell T/C Contract No. N0003367TC421

Gentlemen:

We enclose copies of damage notices which have been presented to and acknowledged by your local representatives at the time of occurrence:

<u>PORT</u>	<u>DATE</u>	<u>HOOR</u>
Sattahip	7/29/67✓	0830
Sattahip	7/30/67✓	0425
Sattahip	8/7/67✓	1935
Sattahip	8/9/67✓	0830
Sattahip	8/9/67✓	1455
Sattahip	8/9/67✓	1533
Danang	11/9 to 11/12/67✓	Various
Cam Ranh	1/17/68✓	2130
Cam Ranh	1/18/68✓	1940
Cam Ranh	1/19/68✓	1405
Cam Ranh	1/19/68✓	2200
Cam Ranh	1/23/68✓	unknown
Vung Ro	1/24/68✓	2045
Vung Ro	1/24/68✓	Various
Vung Ro	1/25/68✓	Various
Vung Ro	1/24/68✓	Various
Vung Ro	1/25/68✓	Various
Vung Ro.	1/26/68✓	Various
Vung Ro	1/24/68✓	Various
Vung Ro	1/25/68✓	Various

Exhibit B, Letter Dated August 5, 1968.

<u>PORT</u>	<u>DATE</u>	<u>HOOR</u>
Nha Trang	1/26/68✓	2300
Sattahip	8/1/67	1356

In 137
 Note: This last one is also accompanied by our letter to MSTs, Brooklyn, dated September 19, 1967.

There are considerable expenses involved in these repairs which we will invoice to you shortly based on actual repairs in some cases and estimated cost of repairs and time involved in the others.

If you prefer, however to make us promptly an offer to liquidate all damages and save us additional time and administration in these matters, we will consider it. *no*

Very truly yours,

JAMES W. ELWELL & CO., INC.

H. L. Cederholm
 H. L. Cederholm
 Vice President

HLC:la

encl.

Opinion by Charles M. Metzner, J.

METZNER, D. J.:

Plaintiff Battery Steamship Corp. (Battery) seeks recovery of \$47,595 from defendant United States for damage to its ship, the SS Elwell, sustained in a collision with an oil barge owned by defendant Refineria Panama, S.A. (Refineria) during the fueling of the Elwell at Colon Bay, Panama, on June 25, 1967. At the time of the accident, the Elwell was time chartered to Military Sea Transport Service (MSTS), an agency of the United States Government. Her master and crew were supplied by Battery.

Article 16 of the charter party provided that fuel for the vessel could be supplied by either party or by a third party procured by MSTS. MSTS had ordered fuel from Refineria. While the fuel was being loaded, Refineria's barge, Oilbar #4, repeatedly struck the port side of the Elwell, damaging her. This action seeks to recover the damage caused by the negligence of its alleged agent, Refineria. The complaint was amended on August 25, 1971, to include Refineria as a party defendant, but this action was dismissed as time barred.

Under the terms of Amendment 3 to the charter party, dated August 7, 1968, Battery waived all damage claims against the United States except for those enumerated in a letter dated August 5, 1968. The June 25, 1967 collision was not included in this letter. In addition, Amendment 3 to the charter party included a waiver by Battery of that portion of the off-hire survey which would discover damage to the vessel. Finally, the amendment provided that MSTS would redeliver the Elwell to the West Coast of the United States instead of to the Gulf Coast. In consideration, Battery accepted a lump sum payment of \$11,500.

At the trial, evidence of mutual mistake was presented. A. Dan Klyver, who negotiated Amendment 3 for Battery, testified by deposition that Battery intended to waive only that damage as yet unreported to MSTS, primarily any incidental damage caused by stevedores during the

Opinion by Charles M. Metzner, J.

last voyage of the Elwell before its redelivery to Battery. This was the damage which would normally be found during the off-hire survey. Klyver testified that there was no intent to waive the claim for the damage that occurred at Colon Bay, which had already been reported to MSTS on June 30, 1967.

Norton Crockett, the negotiator for MSTS, testified by deposition that it was his intention that all claims not included in the letter of August 5, 1968, would be waived, but that all previously reported claims were being considered. He was personally unaware of the Colon Bay claim at the time of the Amendment 3 negotiations.

That each party intended the waiver to refer only to damage never reported, and not to include the Colon Bay claim, is supported by the fact that this latter claim for \$47,595 was substantial, one not likely to be released in exchange for the relatively small consideration being offered by MSTS. Also, Battery's telegraphed offer of August 6, 1968, during the negotiation of Amendment 3, stated specifically that the amount it sought from MSTS to cover repairs did not include previously reported and substantiated damage.

Amendment 3 is subject to reformation so that it reflects the intent of Battery and of MSTS to waive only claims not reported at any time. *Battery Steamship Corp. v. Refineria Panama, S.A.*, 513 F.2d 735 (2d Cir. 1975); *Southwest Welding & Manufacturing Co. v. United States*, 373 F.2d 982 (Ct. Cl. 1967).

Even though the instant claim was not waived by Battery, the facts indicate that the United States cannot be held liable for any damage caused by negligence on the part of Refineria, either under a contract theory of absolute liability or a tort theory of *respondeat superior*.

Article 16 of the charter party provided that MSTS was to reimburse Battery for any fuel Battery supplied and for reasonable incidental costs incurred in loading this fuel. Reasonable expenses are defined to include expenses

Opinion by Charles M. Metzner, J.

at the tanker terminal, crew overtime costs, the cost of loading fuel from lighterage, and similar expenses necessarily incurred in the loading of fuel. The charter party explicitly provided that either party or a third party might supply fuel to the Elwell. This liability on the part of the government to pay for the necessary fuel did not include the furnishing of the fuel similar to Chevron's obligation in *Fairmont Shipping Corp. v. Chevron International Oil Co.*, 511 F.2d 1252 (2d Cir. 1975).

In Article 8 of the charter party, MSTs does assume liability for damage to the vessel caused by "the Charterer, its agents, employees or contractors in performing the Charterer's duties of loading and discharging" cargo. The handling of cargo is, however, a distinct operation from that of fueling. It is performed by stevedores who are either employees of the United States, or under its direction and control. The provisions of Article 8 are not incorporated into Article 16. As a time charterer, with none of its own personnel aboard the Elwell, MSTs did not agree to be the absolute insurer of the vessel against all mishaps, regardless of cause.

Any liability of MSTs in tort depends upon the principle of *respondeat superior*. A master is liable for the acts of his servants committed within the scope of employment. *Restatement (Second) of Agency* § 219. Refineria was an independent contractor engaged in a distinct business from that of MSTs. Its only contact with Refineria was to place the order for the fuel and to pay the bill. Any negligence on its part cannot be imputed to Bartery. See, *Peter v. Public Constructors Inc.*, 368 F.2d 111 (3d Cir. 1968); *Tropea v. Shell Oil Co.*, 307 F.2d 757, 770-71 (2d Cir. 1962).

Battery's remedy was to seek recovery from Refineria, but it failed to do so in a timely manner. The complaint is dismissed.

So ordered.

Dated: New York, N. Y., August 22, 1975.

CHARLES M. METZNER
U.S.D.J.

Amendment to Opinion by Charles M. Metzner, J.

Battery Steamship Corp. v. Refineria
Panama, S.A. and United States of
America, 69 Civ. 2736

Amendment to Opinion No. 42995

In the court's opinion dated August 22, 1975, the sentence
on page 6, line 8, should be corrected to read as follows:

“Any negligence on its part cannot be imputed to
MSTS.”

So ordered.

Dated: September 8, 1975.

CHARLES M. METZNER
U. S. D. J.

**Judgment Appealed from USDC,
September 17, 1975, SDNY.**

This action was commenced on June 24, 1969 by the Battery Steamship Corp. against defendant, United States of America.

The plaintiff alleging that the United States was liable to it for damage sustained to its vessel in Panama in June 1967.

Plaintiff filed an amended complaint on August 25, 1971 naming Refineria Panama, S.A. as a co-defendant.

Thereafter Refineria Panama, S.A. moved for summary judgment dismissing the complaint as time barred and the Court granted that motion in December 1972.

The government then moved for summary judgment dismissing the complaint against the United States in June 1973 and the Court granted that motion in September 1973 (opinion #39857).

Plaintiff then appealed from that memorandum opinion and the Court of Appeals reversed and remanded the case *Battery Steamship Corp. v. Refineria Panama, S.A.*, 513 F.2d 735 (2d Cir. 1975).

Thereafter this action against the United States was tried before the Honorable Charles M. Metzner, District Judge, who after giving due deliberation to all the evidence, filed a memorandum decision (#42,995) dated August 22, 1975 dismissing the complaint against the United States, it is therefore,

ORDERED, ADJUDGED AND DECREED that the cause of action by plaintiff, Battery Steamship Corp., against the United States be and hereby is dismissed with costs to be taxed in favor of the United States, and it is further

*Judgment Appealed from USDC,
September 17, 1975, SDNY.*

ORDERED that the word "Battery" at line 6 of opinion
#42,995 be changed to read "MSTS."

Dated: New York, New York, September 11, 1975.

CHARLES M. METZNER
U.S.D.J.

We hereby consent to the entry of the foregoing judgment.

DOUGHERTY, RYAN, MAHONEY,
PELLEGRINO & GIUFFRA
Attorneys for Plaintiff
By: s/ ROBERT J. GIUFFRA

PAUL J. CURRAN
United States Attorney
GILBERT S. FLEISCHER
Attorney in Charge
Admiralty & Shipping Section
Department of Justice
Attorneys for Defendant, U.S.A.
By: s/ TERENCE GARGAN

Judgment entered 9/17/75.

RAYMOND F. BURGHARDT
Clerk

Notice of Appeal.

Notice is hereby given that the plaintiff Battery Steamship Corp. appeals to the United States Court of Appeals for the Second Circuit from the judgment entered in the United States District Court for the Southern District of New York on September 17, 1975, both on the question of law and facts.

Dated: New York, New York, October 8, 1975.

DOUGHERTY, RYAN, MAHONEY, PELLEGRINO
& GIUFFRA
Attorneys for Plaintiff

By: /s/ ROBERT J. GIUFFRA

To: PAUL J. CURRAN
United States Attorney
Gilbert S. Fleischer
Attorney in Charge
Admiralty & Shipping Section
Attorneys for Defendant, USA
filed 10/9/75

(59122)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BATTERY STEAMSHIP CORP.,

Plaintiff-Appellant,

against

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL BY BATTERY STEAMSHIP CORP. FROM A DECISION OF THE
UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

**AFFIDAVIT
OF SERVICE**

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Juan Delgado, being duly sworn, deposes and says that he
is over the age of 18 years, is not a party to the action, and resides
at 510 Riverside Drive, New York
That on December 31, 1975, he served 1 copies of Joint Appendix
by Attorneys for the Respective Parties
on

THOMAS J. CAHILL, ESQ.,
United States Attorney
GILBERT S. FLEISCHER,
Attorney in Charge
Admiralty & Shipping Section
Department of Justice
26 Federal Plaza
New York, New York.

by delivering to and leaving same with a proper person or persons in
charge of the office or offices at the above address or addresses during
the usual business hours of said day.

Sworn to before me this
31st day of December, 1975

Juan Delgado

John V. D'Esposito
JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

MEMORANDUM FOR THE DIRECTOR

FROM: SAC, NEW YORK

DATE: 1/10/50

SUBJECT: [Illegible]

RE: [Illegible]

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